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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of)	
)	
Tri-State Mint, Inc.,)	Docket Nos. EPCRA-VIII-89-05
et al.,)	& CEPC-VIII-89-01
)	
Respondents)	

O R D E R

In its order, dated April 22, 1994, the EAB noted that there appeared to be several significant unresolved factual issues relating to the representativeness of the samples relied upon by Complainant and the procedures used to test the samples as well as the knowledge of the Respondents for purposes of the CERCLA and EPCRA notification requirements (Remand Order at 21). Accordingly, the case was remanded so that the ALJ ". . . can make findings as to these and any other material, unresolved factual issues, including the ultimate issues of liability and, if necessary, the appropriateness of the proposed penalty amount."^{1/}

In response to the ALJ's order that the parties submit their views and recommendations for further proceedings in the matter, counsel for Respondents stated, inter alia, that we have, since the hearing, discovered additional evidence with

^{1/} Id. Although not so stated, the remand was pursuant to Rule 22.31(c) which allows the EAB to remand a case to the ALJ for "further proceedings."

regard to the representativeness of the sample (letter, dated June 7, 1994). The letter further stated that counsel for Complainant was aware of this additional evidence and that Respondents desired to present it by stipulation, or, if counsel did not wish to stipulate, by appropriate testimony.

Counsel for Complainant has opposed the introduction of new evidence, pointing out that Respondents have not addressed the requirements of 40 CFR Part 22, Subpart E, for reopening a hearing and that these requirements have not been met (letter, dated June 10, 1994). Should it be determined to be appropriate to reopen the hearing, Complainant stated, however, that it had new information regarding the samples being characteristic waste in accordance with 40 CFR Part 261, Subpart C, which it desired to introduce into evidence.

Complainant's argument that additional evidence may not be taken absent compliance with the requirements of Rule 22.28 for reopening a hearing ignores or misunderstands the effect of the remand and is rejected. The simple fact is that as to the issues involved in the remand, the record was only provisionally closed and remains open. Accordingly, it concluded that as to the issues upon which the case was remanded there is no necessity to "reopen the hearing" and that I may appropriately accept additional evidence upon such issues. In this regard, the EAB's remand includes not only factual issues as to the representativeness of the samples and the procedures used to

test the same,^{2/} but any other material, unresolved factual issues, including the ultimate issues of liability and, if necessary, the appropriateness of the penalty amount.

O R D E R

In view of the foregoing, Complainant is directed to reconsider its refusal to stipulate the additional evidence referred to by Respondents into evidence and to inform Respondents and the ALJ of the result of its reconsideration on or before July 29, 1994.^{3/} If Complainant persists in its refusal to stipulate, I will be in telephonic contact with counsel for the purpose of setting a time and location for the additional hearing.

Dated this 19th day of July 1994.


Spencer T. Nissen
Administrative Law Judge

^{2/} Inasmuch as the sample tested by Twin City Testing was drawn on January 30, 1989 (Initial Decision, finding 11), "errata" deleting the language "prior to the more than sixfold dilution shown here" from footnote 24 appear to be erroneous.

^{3/} Presumably, Respondents are willing to stipulate into the record additional evidence desired by Complainant.

CERTIFICATE OF SERVICE

This is to certify that the original of this ORDER, dated July 19, 1994, in re: Tri-State Mint, Inc., et al., Dkt. Nos. EPCRA-VIII-89-05 & CEPC-VIII-89-01, was mailed to the Regional Hearing Clerk, Reg. VIII, and a copy was mailed to Respondents and Complainant (see list of addressees).



Helen F. Handon
Legal Staff Assistant

DATE: July 19, 1994

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